Supreme Court, U.S.
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No. 07 - 114

IN THE
SUPREME COURT OF THE UNITED STATES

* * * * *

ROBERT BURNS,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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PETITION FOR WRIT OF CERTIORARI

* * * * *

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QUESTION PRESENTED

Whether the Missouri Court of Appeals erred in denying relief by reformulating the *Strickland v. Washington* prejudice standard to require Mr. Burns to show that witnesses not called by trial counsel would have provided him with a "viable defense"?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Robert Burns, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Missouri Court of Appeals rendered in these proceedings on January 23, 2007.

OPINION BELOW

The unpublished order and memorandum of the Missouri Court of Appeals is reprinted in the Appendix at page 1a, *infra*. The unpublished order of the Missouri Court of Appeals denying rehearing is reprinted in the Appendix at page 45a, *infra*. The unpublished order of the Missouri Supreme Court denying transfer is reprinted in the Appendix beginning at pages 46a, *infra*.

JURISDICTION

The judgment of the Missouri Court of Appeals, was entered January 23, 2007. A timely petition to that court for rehearing or, in the alternative, for transfer to the Missouri Supreme Court was denied February 27, 2007. A timely application to the Missouri Supreme Court for transfer was denied on May 1, 2007.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in this favor, and to have the assistance of counsel for his defence.

U.S. CONST. Amend. XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Summary. This petition concerns the denial of post-conviction relief to Mr. Burns on the ground that his trial counsel's failure to call witnesses who would have corroborated his testimony and that of his wife and co-defendant was not prejudicial to him.

Facts and procedural history. Mr. Burns was tried jointly with his wife, Marsha Burns (Mrs. Burns), who was

represented by separate counsel. Evidence presented at trial showed that Mrs. Burns had left Mr. Burns, taking her children with her, and traveled from their home outside Kansas City, Missouri to southern Missouri where she took refuge in a shelter for battered women and children. Subsequently, two of the Burns children, Robert, Jr. and Erica, told authorities that both Mr. and Mrs. Burns had molested them. The children testified at trial that their parents had committed improper sexual acts. Mrs. Burns testified at trial that after she arrived in southern Missouri, she told the children to accuse their father of abusing them so that Mr. Burns would not be able to get custody of the children, but that in fact, neither child had been molested by either herself or Mr. Burns. Her testimony and other evidence indicated that at the time she left Mr. Burns, she was suffering from severe post-partum depression. Mr. Burns also testified at trial, and denied any improper acts. No physical evidence of abuse was presented at trial.

The jury convicted both Mr. and Mrs. Burns, and recommended sentences on Mr. Burns totaling 120 years, which were imposed by the trial court.

Renea Comstock met Mrs. Burns before Mrs. Burns was charged when both were in a homeless shelter and apartment complex in southern Missouri. Ms. Comstock overheard Mrs. Burns coaching the children to maintain their story that Mr. Burns had molested them. Ms. Comstock also talked to the children herself, and learned that they were unhappy about having to tell this story, but were doing so to support their mother. Ms. Comstock lost touch with Mrs. Burns when Mrs. Burns was arrested..

Ms. Comstock learned of the charges against Mr. and Mrs. Burns for the first time, after they were convicted, by reading the Kansas City Star in the public library in

Springfield, Missouri. She then contacted Mrs. Burns's attorney, provided an affidavit in support of Mr. and Mrs. Burns's motion for new trial, and testified at the hearing on the motion for new trial. At that hearing, the prosecutor presented affidavits from the minor children indicating that they had not discussed the matter with Ms. Comstock.[1] The prosecutor also presented testimony that the Kansas City Star was not available in the Springfield public library. This testimony was later shown to be mistaken; the Kansas City Star representative testified at the post-conviction hearing that he was unaware that the paper was delivered by mail in Springfield.

Mr. Burns's motion for new trial was denied, and his conviction was affirmed on direct appeal. App. 47a, *infra.* He then filed a motion under Mo. Sup. Ct. R. 29.15 for post-conviction relief, alleging, *inter alia*, ineffective assistance of counsel for failure to investigate and call witnesses. The motion court held an evidentiary hearing on Mr. Burns's motion. The following evidence was presented at the hearing.

Trial counsel did not interview or call as witnesses a number of people, listed for him by Mr. Burns, who could have testified that the Burnses had a good and normal relationship with their children. These witnesses included Shawn Callahan and Regina Jones, both of whom had spent considerable time as children at the Burns home and never observed the pervasive abuse described by Robert, Jr. and Erica Burns. Rhonda Jones Allen, the mother of Regina, Mr. Burns's sister, was present at the trial but was not called. Connie Sherman, Don Smith, and Jeff and Kathy Ramseier all knew Mr. Burns from work, and had spent time with him and his family and observed the interaction between the

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[1] The prosecutor argued that the children had said they did not even know Ms. Comstock, but this statement was not supported by the children's affidavits.

Burns parents and their children. All would have been willing to testify at trial concerning their relationship with the Burns family and the fact that they never observed any abnormalities, but were never contacted by trial counsel.

Trial counsel acknowledged that he had not contacted any of these witnesses. He described them as "character" witnesses (despite the fact that they would have testified to their personal observations of the family rather than to character traits) and said that he felt that they would have been subject to harmful cross-examination.

Angela Bustamonte, the sister of Mrs. Burns, testified at the post-conviction hearing that before leaving town after leaving their home, Mrs. Burns and the children came to Ms. Bustamonte's beauty shop to get some money for a place to stay that night. Mrs. Burns told Ms. Bustamonte that Robert, Sr. had molested her son and daughter. Ms. Bustamonte went to the daughter and told her that this was not her fault and that her father was not supposed to have sex with her. The daughter appeared not to know what Ms. Bustamonte was talking about. This testimony was consistent with Mrs. Burns's trial testimony that she concocted the molestation story only after arriving in southern Missouri. Trial counsel did not interview Ms. Bustamonte before trial, he testified at the post-conviction hearing that he had left the investigation of witnesses to be called from Mrs. Burns's family to counsel for Mrs. Burns.

Trial counsel also failed to interview and call as a witness Ray Smith. Ray Smith, a cousin of Mr. Burns, came to the Burns home to return a piece of furniture a few days before Mrs. Burns left with the children. Mr. and Mrs. Burns and their children were there. While he was there, Mrs. Burns asked him to engage in sexual activity. Mr. Burns discovered the two of them in the bedroom, became angry

and asked Mr. Smith to leave. Both Mr. and Mrs. Burns testified at trial that this incident occurred and was part of Marsha Burns's motive for leaving Robert Burns and fabricating a story of child abuse, but their testimony was uncorroborated.

Trial counsel had reviewed a written statement from Mr. Smith, but never interviewed him. Mr. Smith would have been available to testify, and in fact, wanted to do so. Trial counsel decided not to interview or call Mr. Smith because there was a joint defense with Mrs. Burns and he felt that this testimony would be harmful to her.

Trial counsel failed to investigate Mrs. Burns's activities or associates during the time she was in southern Missouri before the children were taken into state custody. He left this investigation to counsel for Mrs. Burns; her attorney testified that he had not performed such an investigation either. For this reason, neither attorney discovered the testimony of Ms. Comstock before trial.

The motion court denied post-conviction relief, and its decision was appealed to the Missouri Court of Appeals, Western District. The court of appeals sidestepped the "performance prong" of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), and determined that the failure to call all of the witnesses listed above was not prejudicial because they would not have provided Mr. Burns with "a viable defense." For example, in connection with the failure to call the witnesses who could have testified to their observations of the Burns's normal family life, the court held, "The witnesses' observations of 'normal family interactions' would not have established that the complained of acts did not occur." App. 6a. The court of appeals further held that the testimony of Ms. Comstock would not have established a "viable defense" because her testimony was cumulative of

the trial testimony of Mrs. Burns, so that Ms. Comstock did not establish a new or different defense.

After an unsuccessful motion for rehearing or transfer to the Missouri Supreme Court, Mr. Burns applied directly to the Missouri Supreme Court for transfer. That application was denied, and this petition follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO PREVENT STATE COURTS FROM PLACING AN IMPROPER AND EXCESSIVE BURDEN ON POST-CONVICTION PETITIONERS TO SHOW PREJUDICE FROM INEFFECTIVE ASSISTANCE OF COUNSEL.

The court of appeals held that failure to call witnesses is only prejudicial where the witness would provide a "viable defense." That assertion is an incorrect and unconstitutional application of the standard for demonstrating prejudice from ineffective assistance of counsel, because it requires more prejudice than must be shown under this Court's precedents.

In *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), this Court did not require that an omitted witness "provide a viable defense" in order for a court to find that the witness's absence was prejudicial. Rather, as to witnesses, the Court applied the same rule it applied to all instances of ineffective assistance of counsel: The error is prejudicial if there is a reasonable probability that the outcome would have been different had the error not occurred. In *Williams (Terry) v. Taylor*, 529 U.S. 562 (2000), this Court made clear that

this test still applies, and that it requires a finding of less than a preponderance of evidence of a different outcome.

In this case, the Missouri Court of Appeals used the "viable defense" standard not as a shorthand version of the "reasonable probability" test but to require far more than *Strickland* prejudice. The court held that in order to show prejudice, Mr. Burns must establish that the testimony of the uninvestigated and uncalled witnesses proved independently that the offense did not occur or that the Mr. Burns did not commit it. Thus, the fact that the observations of numerous persons who knew Mr. and Mrs. Burns made less credible the testimony of the Burns children that abuse had occurred over a long period of time was completely discounted by the court of appeals because it did not "establish" that the charged acts did not occur. [2] The fact that Ms. Comstock provided independent corroboration of Mrs. Burns's testimony was discounted because it was "cumulative" of Mrs. Burns's testimony.

This problem of Missouri law is not unique to Mr. Burns's case. The "viable defense" language has been used repeatedly in the Missouri courts. The most recent reference is in *Glass v. State*, 2007 WL 1953413 (Mo. Sup. Ct. July 3, 2007.) A typical instance of the application of the standard to deny relief is in *DeClue v. State,* 218 S.W.3d 632 (Mo. App. 2007). There the court concluded that the failure to call a witness who would have impeached the testimony of a prosecution witness as to a confession by the defendant was not prejudicial because the omitted witness did not provide a "viable defense." Other examples of the improper use of the "viable defense" standard include *Phillips v. State*, 214 S.W.3d 361 (Mo. App. 2007), where the court found that the

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[2] As the court put it, "Witnesses who merely impeach the State's witnesses do not provide movant with a defense to a charged crime." App. 6a.

failure to call several witnesses who would have cast doubt on the issue of whether the defendant's car was the only one at the scene of the crime was not prejudicial because their testimony was not "determinative." The court in *McClendon v. State*, 2007 WL 218777 (Mo. App. E.D. Jan. 30, 2007), denying relief where trial counsel failed to call a witness, made clear that under Missouri law that a witness provides a "viable defense" only when his testimony negates an element of the crime. Similarly, the court in *Whited v. State*, 196 S.W.3d 79, 83 (Mo. App. 2006), held, "When the testimony of the witness would only impeach the state's witnesses, relief on a claim of ineffective assistance of counsel is not warranted."[3]

Missouri is not the only jurisdiction with a comparable and improper standard for ineffective assistance of counsel. In *Pineo v. State*, 908 A.2d 632, 637 (Me. 2006), the court held that in order to show prejudice, a Maine defendant must demonstrate that "ineffective representation likely deprived the defendant of an otherwise available substantial ground of defense." And the Texas Court of Appeals has held that prejudice from failure to investigate is shown only if "the consequence of the failure to investigate is that the only viable defense available to the defendant is not advanced, and there is a reasonable probability that, but for counsel's failure to advance the defense, the result of the proceeding would have been different." *Hernandez v. State*, 2006 WL 397922*2 (Tex. App-San Antonio, Feb. 22, 2006), citing *Cantu v. State*, 993 S.W.2d 712, 718 (Tex. App.-San Antonio 1999, pet. ref'd).

It is significant that these cases were decided after *Williams (Terry) v. Taylor*, 529 U.S. 562 (2000), which

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[3] That this is a favorite phrase of Missouri courts is evidenced by the fact that, according to Westlaw, the terms "29.15" and "viable defense" occur together in 245 Missouri opinions.

clearly established that the *Strickland* prejudice standard must be applied. Despite this direct guidance, however, state courts, particularly in Missouri, continue to attempt to limit relief by various reformulations of the *Strickland* standard that place an increased burden on the petitioner.

Under a correct application of the *Strickland* test, Mr. Burns is entitled to relief.[4] The omitted witnesses in his case would have corroborated his testimony and that of his wife and co-defendant. But under Missouri law, the omission of such witnesses can *never* be prejudicial because they do not, by themselves, establish a defense or negate the defendant's commission of the offense. The Missouri Court of Appeals reasoned that corroboration evidence is "cumulative," and therefore its omission can never be prejudicial. But evidence is not "cumulative" where it relates to a disputed issue. As the Seventh Circuit put it in *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000),

> The impact of three more witnesses corroborating Washington's alibi would not have been "cumulative" as the Wisconsin Court of Appeals believed. Evidence is cumulative when it "supports a fact established by existing evidence," BLACK'S LAW DICTIONARY 577 (7th ed. 1999), but Washington's whereabouts on the day of the robbery was far from established—it was the issue in the case.

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[4] Mr. Burns acknowledges that the court of appeals did not find that counsel's failure to investigate and call these witnesses was unreasonable, turning instead directly to the prejudice question. This Court, of course, has emphasized that "strategic" decisions like those here, made without the benefit of full investigation, are not entitled to much weight. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

Like the whereabouts of Washington in the *Smith* case, whether the Burns children were fabricating their allegations of abuse was "far from established." It was the focus of Mr. Burns's defense. The testimony of Ms. Comstock that she overheard Mrs. Burns coaching the children and that the children admitted to her that they were lying did not pertain to an issue which was otherwise established, and its omission was highly prejudicial.

The Sixth Circuit has also addressed the contention that multiple witnesses to the same facts are not necessarily cumulative:

> This evidence plainly would have bolstered [the petitioner's] defense and was anything but cumulative.... [The petitioner] had just one witness at trial (Greenlee) who could support his alibi defense. Doubtless, three other witnesses, who like Greenlee did not previously know [the petitioner] and accordingly had no axe to grind in testifying on his behalf, would have aided the defense.

Bigelow v. Williams, 367 F.3d 562, 565 (6th Cir. 2004).

Other courts also find the failure to present corroboration evidence clearly prejudicial under the *Strickland* standard. For example, in *Stewart v. Wolfenbarger*, 468 F.3d 338, 358 (6th Cir. 2006), the court found prejudice where omitted witnesses who corroborated alibi testimony "would have added a great deal of substance and credibility to [the petitioner's] alibi.". And in *Smith v. Dretke*, 417 F.3d 438, 443 (5th Cir. 2005), the court found prejudicial the failure to call witnesses who would have corroborated the defendant's testimony about the violent nature of the victim, noting, "Without corroboration. . . [the

defendant's] statements were easily discounted by the prosecuting attorney. . ."

In the above-cited habeas corpus cases, the Courts of Appeal found that the state court analyses were not merely wrong, but were an unreasonable application of established federal law under 28 U.S.C. §2254(d). This case, on the other hand, is before this Court for direct review of the decision of the Missouri Court of Appeals. This Court should take the opportunity, uncomplicated by the application of 28 U.S.C. §2254, to clarify the standards state courts should use to determine *Strickland* prejudice. Because §2254(d) limits this Court's ability to grant relief for state court errors in the application of this Court's precedents, it is particularly important that those courts receive this court's guidance in direct review cases. At a minimum, the grant of certiorari in this case would correct a pervasive error in Missouri constitutional jurisprudence, and it would also assist the courts of other states in properly applying the law of ineffective assistance of counsel.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Missouri Court of Appeals, Western District.

Respectfully submitted,

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